

DRAFT NOVEMBER 9, 1989

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

Draft 2

Site:	_____
ID #:	_____
Break:	_____
Other:	_____

IN THE MATTER OF)
)
CHEROKEE COUNTY SITE)
Cherokee County, Kansas,)
)
AMAX, INC.)
New York, New York,)
)
GOLD FIELDS AMERICAN)
CORPORATION)
New York, New York,)
)
ASARCO)
New York, New York,)
)
NL INDUSTRIES, INC.)
New York, New York,)
)
EAGLE-PICHER INDUSTRIES, INC.)
Cincinnati, Ohio,)
)
ST. JOE MINERALS CORPORATION)
Irvine, California,)
)
HOUSEHOLD FINANCE CORPORATION)
Prospect Heights, Illinois,)
)
PERU MINING COMPANY,)
a dissolved corporation)
Prospect Heights, Illinois,)
)
LTV STEEL CORPORATION)
Cleveland, Ohio,)
)
SHARON STEEL COMPANY)
Denver, Colorado,)
)
> SUN COMPANY)
Radnor, Pennsylvania,)
)

Respondents.)
)

Proceeding Under Sections)
104(b) and 122(d)(3) of the)
Comprehensive Environmental)
Response, Compensation, and)
Liability Act as amended,)
42 U.S.C. §§ 9604(b), 9622)
(d)(3).)

ADMINISTRATIVE ORDER
ON CONSENT

U.S. EPA Docket No. _____



S00031518
SUPERFUND RECORDS

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PRELIMINARY STATEMENT

1. This Administrative Order on Consent (herein "Consent Order") is entered into voluntarily by the United States Environmental Protection Agency (herein "EPA") and Respondents, AMAX, Inc.; Gold Fields Mining Corporation; ASARCO; N.L. Industries, Inc.; Sun Company; Eagle-Picher Industries, Inc.; St. Joe Minerals Corporation; Household Finance Corporation; Peru Mining Company; LTV Steel Company; and Sharon Steel Company (herein collectively "Respondents"). This Order concerns the preparation, performance, and oversight of a Remedial Investigation and Feasibility Study(ies) (herein "RI/FS(s)") for the Baxter Springs and Treece subsites of the Cherokee County Superfund site located in Cherokee County, Kansas (herein, the "Baxter Springs and Treece Subsites").

JURISDICTION

2. This Consent Order is issued under the authority vested in the President of the United States by Sections 104(b) and 122(d)(3) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9674, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499 ("CERCLA"). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to the Regional Administrators on September 13, 1987 by EPA Delegation No. 14-14-C. For Region VII, this authority has been redelegated by the Regional Administrator to the Director, Waste

Management Division, by EPA Delegation No. R7-14-14-C, dated May 16, 1988.

3. For purposes of entering into this Consent Order only, Respondents agree that EPA has jurisdiction to issue this Order, and agree not to contest or legally challenge said jurisdiction or the terms of issuance of this Consent Order. Respondents also agree to undertake all actions required of them by the terms and conditions of this Consent Order. This Consent Order is issued without adjudication of any fact or law to facilitate and to satisfy the parties' shared objective of preparing timely and complete RI/FS(s) in accordance with the National Contingency Plan, 40 C.F.R. Part 300 ("NCP"), for the Baxter Springs and Treece Subsites.

4. Except as limited by this Consent Order, Respondents do not waive and explicitly reserve all rights (including the right to contribution and indemnity), claims, or defenses which they may have under CERCLA, any other statute, or the common law, in any proceeding relating to the Cherokee County Superfund site or any of its subsites. The respondents specifically deny: the Findings of Fact and Conclusions of Law set forth herein; that much of the material at issue in the Cherokee County Superfund site is "waste" and that mining wastes and any substances contained therein are hazardous substances as that term is defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), or the source or cause of any releases or threatened releases associated with the Cherokee County Superfund site; and EPA's determination that the actions required by this Consent Order are

↑ necessary for the reasons set forth in Article V. In addition, Respondents specifically reserve the right to raise objections to EPA's prior and future data and conclusions with respect to the Cherokee County Superfund site or any of its subsites. Neither this Consent Order, nor any part thereof, nor the entry into or performance under this Consent Order, shall constitute or be construed as a finding, admission or acknowledgement by Respondents of the factual or legal allegations contained in the Consent Order.

^ 5. Notice of the issuance of this Consent Order has been given to the State of ^Kansas through notice to the Kansas Department of Health and Environment (KDHE).

ARTICLE I. PARTIES BOUND

^ 6. The terms of this Consent Order shall apply to and be binding upon EPA and ^Respondents, their agents, successors, and assigns and upon all persons, contractors, and consultants acting under or on behalf of EPA or ^Respondents. ^ The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Consent Order. No change in the ownership, corporate or partnership status of any Respondent ^ shall alter its responsibilities under this Consent Order.

^ 7. ^ Respondents shall also provide a copy of this Consent Order to their Project Coordinator, and notify all other contractors, sub-contractors, laboratories, and consultants which are retained to conduct any work performed under this Consent

Order of its availability, within fourteen (14) days after the effective date of this Consent Order or the date of retaining their services, whichever is later. Notwithstanding the terms of any contract, Respondents, and not their contractors and agents, are responsible to EPA for compliance with this Consent Order and for ensuring that their contractors and agents comply with this Consent Order.

ARTICLE II. STATEMENT OF PURPOSE

8. In entering into this Consent Order, the mutual objectives of EPA and Respondents are: (a) to determine the nature and extent of any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants from the Baxter Springs and Treece Subsites by conducting a Remedial Investigation(s) ("RI(s)"), including preparing an Endangerment Assessment(s) ("EA(s)") for the Baxter Springs and Treece Subsites; (b) to determine and evaluate alternatives for remedial action, to prevent, mitigate or otherwise respond to or remedy the threat, (if any), to public health, welfare or the environment resulting from any release or threatened release of hazardous substances, pollutants, or contaminants from the Baxter Springs and Treece Subsites by conducting a Feasibility Study(ies) ("FS(s)") for the Baxter Springs and Treece Subsites; and (c) to reimburse EPA for its oversight costs reasonably incurred consistent with the NCP in the course of implementation of this Consent Order.

9. The activities conducted under this Consent Order are subject to approval by EPA and shall provide all appropriate, necessary information for the RI/FS(s) and for a record of decision that is required by and consistent with CERCLA §§ 104, 121 and 122, 42 U.S.C. §§ 9604, 9621 and 9622, the NCP, and all relevant and applicable EPA guidance.

ARTICLE III. FINDINGS OF FACT

The following paragraphs summarize the factual determinations made by EPA in support of this Consent Order.

10. The Baxter Springs and Treece Subsites are two of the six subsites within the Cherokee County Superfund site in Cherokee County, Kansas. The Cherokee County site is the Kansas portion of the Tri-State Mining District which also extends into Oklahoma and Missouri.

11. Valuable ores were first discovered in the Tri-State Mining District in 1848. The primary ores of interest were the lead-zinc sulfide minerals. Mining of lead and zinc was conducted in Cherokee County until 1970.

12. Ore milling conducted during the early mining period of Cherokee County was only partially effective in removing ore containing lead and zinc from the host rock. More efficient processes used in the later mining period generated finer milling wastes, although these were generally pea-gravel sized. Much of these materials remain distributed over several hundred acres in the vicinity of Baxter Springs and Treece.

24. The Baxter Springs and Treece Subsites contain underground mines, and surficial mine waste. Leachate from the mines and waste piles could reach the ground water and surface water in the area, including, potentially, the migration of shallow ground water downward to the deep aquifer through potential pathways such as (abandoned) deep wells, boreholes, natural discontinuities or fractures.

25. Under certain circumstances, extended exposure to lead and its various forms at high concentrations can increase the risk of future adverse health effects such as central nervous system, peripheral nervous system, kidney and blood disorders in humans.

26. Under certain circumstances, extended exposure to cadmium and its various forms through inhalation at high concentrations can increase the risk of future health effects such as cancer in animals and potentially in humans, teratogenicity, reproductive toxicity and kidney disorders in humans.

27. Under certain circumstances, extended exposure to zinc and its various forms at high concentrations can increase the risk of future health effects such as fever, vomiting, stomach cramps, defective mineralization of the bone in humans and acute toxicity in freshwater organisms.

28. Respondents were owners or operators, or are corporate successors in interest to the owners or operators, of mines, during the time when ^{or wastes} mining related-materials were disposed of at the Baxter Springs and Treece Subsites.

ARTICLE IV. CONCLUSIONS OF LAW

Based on the preceding Findings of Fact, EPA has made the following Conclusions of Law:

29. Respondents are "person[s]" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

30. The Baxter Springs and Treece Subsites are each a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

31. Respondents are or were "owner(s)" or "operator(s)" of various properties within either the Baxter Springs and/or Treece Subsites within the meaning of Sections 101(20) and 107(a)(1), and (2) of CERCLA, 42 U.S.C. Sections 9601(20) and 9607(a)(1) and (2).

32. Lead, cadmium and zinc are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

33. The past, present, or potential migration of hazardous substances from these subsites constitutes an actual and/or threatened "release" of hazardous substances as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

34. EPA has incurred and will incur "response costs" within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) in EPA's investigation and oversight of the Baxter Springs and Treece Subsites.

35. For purposes of this Consent Order, respondents are responsible parties within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

ARTICLE V. DETERMINATIONS

> 36. Based upon the above Findings of Fact and Conclusions of Law, EPA has determined that: the actions required by this Consent Order are necessary to protect the public health, welfare or the environment and are in the public interest; that the actions described herein are necessary to ascertain the nature and extent of hazard and to abate any hazard to protect the public health, welfare or the environment; that if conducted as set forth herein, such actions will be consistent with the NCP; that Respondents are qualified to conduct the activities required by this Order; and that liability for the activities required by this Order shall be premised on each Respondent's involvement at the subsite or subsites in question.

> ARTICLE VI. WORK TO BE PERFORMED

> 37. Respondents shall conduct activities and submit deliverables for the RI/FS(s) including Endangerment Assessments ("EAs") for the Baxter Springs and Treece Subsites as specified in the Work Plan, which is attached and incorporated herein as Exhibit A. All such work shall be conducted in accordance with the Work Plan, CERCLA, the NCP, and EPA guidance including, but not limited to, the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01), and any amendments or revisions thereto, to the extent feasible, and any other related EPA guidance.

38. Respondents shall provide draft and final reports or plans to EPA according to the schedule contained in the Work Plan, Section 6.0. EPA shall review the draft and final reports or plans submitted, and EPA shall notify Respondents in writing of EPA's approval or disapproval of these reports or plans or any part thereof. In the event of disapproval, EPA shall specify in writing both the deficiencies and the reasons for such disapproval. For those deliverables that are scheduled for resubmission as set forth in the Work Plan, Respondents shall address EPA comments in the next submission of that specific deliverable. For those deliverables that are scheduled for only a single submission, within thirty (30) calendar days of receipt of EPA notification of draft or final report or plan disapproval, Respondents shall amend and submit to EPA a revised report or plan. In the event of disapproval, Respondents may invoke the dispute resolution process prescribed in Article XX. If EPA disapproval is sustained in dispute resolution, EPA then has the right to conduct a RI/FS for either or both the Baxter Springs and Treece Subsites or any portion thereof, and to seek reimbursement pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, from Respondents for the costs thereof.

39. Nothing in this Consent Order shall limit EPA's authority to order a halt to the Work or to conduct response actions at the Baxter Springs and Treece Subsites when EPA determines that conditions at the Baxter Springs and Treece Subsites, whether addressed by this Consent Order or not, present an imminent and substantial endangerment to public health,

welfare, or the environment and to seek reimbursement for response actions conducted under this authority pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607.

40. If at any time during the RI/FS process, Respondents identify a need for additional data, a memorandum documenting the need for additional data shall be submitted to the EPA Remedial Project Manager (RPM) within twenty (20) days of identification of such need.

41. Respondents shall make presentations at and participate in meetings with EPA on the reasonable request of EPA during the initiation, conduct, and completion of the RI/FS(s). In addition to discussion of the technical aspects of the RI/FS(s), topics may include anticipated problems or new issues.

> EPA conduct additional work

ARTICLE VII. CORRESPONDENCE

42. All verbal notices and written documents, including but not limited to written notices, reports, plans and schedules requested or required to be submitted to EPA or Respondents shall be directed to the following addressees (or any other addressees which the EPA or Respondents may designate in writing to all parties to this Consent Order):

For EPA:

Glenn Curtis
Remedial Project Manager
Waste Management Division
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101
Telephone: (913) 236-2856
Facsimile: (913) 236-2845

> 903

For Respondents:

Telephone:

Facsimile:

ARTICLE VIII. QUALITY ASSURANCE

43. Respondents and all laboratories used by them in connection with this Order shall use quality assurance, quality control, and chain of custody procedures consistent with those described in the "EPA NEIC Policies and Procedures Manual," May 1978, revised November 1984, EPA-330/9-78-001-R and "Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans," December 1980, QAMS-005/80, and any amendments or revisions thereto, while conducting all sample collection and analysis activities required by this Consent Order. Respondents shall consult with EPA in planning for, and prior to, all sampling and analysis as detailed in the Work Plan. In order to provide quality assurance and maintain quality control,

Respondents shall:

(a) Use a laboratory which has a documented Quality Assurance Program that is consistent with EPA guidance document QAMS-005/80.

(b) Assure that EPA personnel and/or EPA authorized representatives are, upon reasonable request, allowed access to the laboratory(ies) and personnel utilized by Respondents for analyses.

(c) Assure that the laboratory used by Respondents for analyses, performs according to a method or methods deemed satisfactory to EPA.

> ARTICLE IX. ADDITIONAL WORK

44. Other work, in addition to the tasks completed under the Work Plan, may be required if EPA determines that without such additional work, the RI/FS(s) would be inconsistent with the NCP. If EPA so determines, EPA shall request in writing that Respondents perform the additional work. Any such requests will be accompanied by a written explanation of the basis for EPA's determination that additional work is required. No later than ten (10) days following receipt of EPA's request, Respondents shall notify EPA in writing of their acceptance or refusal to conduct the additional work. In the event that Respondents agree to conduct the additional work, Respondents shall submit a proposed amendment to the Work Plan that describes the additional work, no later than twenty (20) days after Respondents' acceptance of the additional work. A refusal by Respondents to undertake the additional work shall not constitute a violation of this Consent Order. If Respondents refuse to conduct the requested additional work, EPA may take any and all steps it determines are appropriate to implement the additional work and reserves the right to seek reimbursement pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, from Respondents for the costs thereof.

45. Any modifications to the Work Plan must be in writing and, upon approval by all the parties, shall become part of this Order.

ARTICLE X. COMPLIANCE WITH APPLICABLE LAWS

46. All actions required to be taken pursuant to this Consent Order shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations unless an exemption from any such requirement is provided in this Consent Order, the NCP or CERCLA.

ARTICLE XI. FINAL RI/FS, PUBLIC COMMENT, RECORD OF DECISION, ADMINISTRATIVE RECORD

47. Except as otherwise provided herein, EPA retains the responsibility for the preparation and release to the public of the final RI/FS reports and record or records of decision for the Baxter Springs and Treece Subsites in accordance with CERCLA and the NCP.

48. The contents of the administrative record shall be determined in accordance with the NCP. Respondents must submit to EPA for inclusion in the administrative record non-privileged documents developed during the course of the RI/FS(s) upon which selection of the response actions may be based. Respondents must additionally submit for inclusion in the administrative record any previous studies conducted under state or local or other federal authorities relevant to selection of the response action; all communications between Respondents and state, local or other federal authorities relevant to selection of the response action;

and all non-privileged information about site characteristics or conditions relevant to selection of the remedy.

ARTICLE XII. DESIGNATION OF REMEDIAL PROJECT MANAGER
AND PROJECT COORDINATOR

49. All work to be performed under this Consent Order shall be under the direction and supervision of a qualified professional (the "Project Coordinator") with expertise in hazardous waste site investigations and remediation. Prior to initiating the work, Respondents shall notify EPA in writing of the name, title, and qualifications of the Project Coordinator and any other personnel, including contractors or subcontractors and their personnel, to be used in carrying out the Work required by this Order. Respondents shall amend this notice in writing not later than five (5) days prior to any change in Project Coordinator, contractors or subcontractors. EPA shall notify Respondents in writing within fourteen (14) days of receipt of the notice from Respondents if EPA disapproves, on reasonable grounds, of any persons' technical qualifications. Respondents shall then notify EPA within thirty (30) days of receipt of the written notice of disapproval of the identity and the qualifications of any replacements. If EPA subsequently disapproves of the replacements, EPA may allow Respondents to suggest other replacements or may conduct a complete RI/FS for either or both the Baxter Springs and Treece Subsites under CERCLA and the NCP, and to seek reimbursement for costs from Respondents; or to seek any other appropriate relief. Respondents' Project Coordinator shall be responsible for

overseeing the implementation of the Work Plan under this Consent Order.

50. EPA will designate a Remedial Project Manager (RPM) for the Subsites. The RPM may also designate an on-site representative to observe and monitor the progress of the response actions being performed by Respondents. EPA will notify Respondents of the name, location, address, telephone and affiliation of the RPM and any onsite representative. The onsite EPA representative may direct questions and/or concerns regarding the response actions, potential endangerment of public health, welfare or the environment, or potential releases as a result of the response actions by telephone to the RPM.

51. The RPM will have the authorities given to RPM/OSCs in 40 C.F.R. Part 300, as amended, 50 Fed. Reg. 47912, et seq. (Nov. 20, 1985). The absence of the RPM or other EPA representative from the Baxter Springs or Treece Subsites shall not be cause for stoppage or delay of work.

52. EPA and Respondents each have the right to change their respective RPM or Project Coordinator. The other party must be notified in writing at least 10 days prior to the change.

limited by when 1/11/89
ARTICLE XIII. PROGRESS REPORTS

0/1/89
53. In addition to the deliverables set forth in the Work Plan, Respondents shall provide monthly progress reports to EPA. At a minimum, these progress reports shall: (1) describe the actions which have been taken to comply with this Consent Order during the preceding month, (2) include all results of sampling,

tests and all other non-privileged information, including all analytical data, relevant to the RI/FS(s) that was received by Respondents during the preceding month, (3) describe work planned pursuant to this Order for the next month with schedules included, and (4) describe all problems and anticipated problems encountered, and solutions developed and implemented during the preceding month with respect to the Baxter Springs and Treece Subsites.

ARTICLE XIV. ACCESS TO BAXTER SPRINGS AND TREECE SUBSITES

54. All contracts for laboratory analysis shall provide that EPA representatives are allowed access, for auditing purposes, at all reasonable times and upon reasonable prior notice, to all laboratories utilized by Respondents for sample analysis in connection with the conduct of the RI/FS(s).

55. To the extent such access is available to Respondents, Respondents shall provide access to EPA and KDHE at reasonable times and upon reasonable prior notice to all property upon which any activities are to be or are being conducted or have been conducted pursuant to this Consent Order, such that EPA and KDHE employees, and their authorized representatives, are able to enter and move freely about such property for the following purposes:

a. Inspecting and copying non-privileged records, files, photographs, operating logs, contracts and other documents relevant to this Consent Order that are required to be made

7/2/89 6 EPA records
available pursuant to Section 104(e) of CERCLA, 42 U.S.C.

§ 9604(e);

b. Reviewing the status of conditions at the Baxter Springs and Treece Subsites and the activities being conducted pursuant to this Consent Order;

c. Collecting such samples or conducting such tests as EPA determines are necessary or desirable to monitor compliance with the terms of this Consent Order;

d. Using sound, optical or other types of recording equipment to record activities which have been or are being conducted pursuant to this Consent Order;

e. Verifying data and other information submitted pursuant to this Consent Order; and

f. Upon timely request, Respondents shall provide EPA with split samples during any sampling activity conducted by Respondents pursuant to this Consent Order, provided that EPA will provide the materials, equipment, and personnel necessary for containerizing, handling, storing, and transporting any split it takes.

56. EPA will give Respondents at least twenty-four (24) hours prior notice of a request for access and will include in the request a description of the number and identity of authorized representatives to be provided access and the purpose of the visit. EPA and its representatives agree to conduct themselves at the accessed property in a manner which will minimize disruption of the ongoing activities on the property. EPA reserves the right to exercise its authority pursuant to

Section 104(e) of CERCLA, 42 U.S.C. § 9604(e) or other appropriate Federal or State law, to inspect the Baxter Springs and Treece Subsites with or without notice to Respondents. All parties with access to the Baxter Springs and Treece Subsites under this Article shall comply with the health and safety plans for the Subsites.

57. Respondents shall use their best efforts to obtain access agreements from the present owners of property within or adjacent to the Baxter Springs and Treece Subsites where necessary for purposes of carrying out the terms of this Consent Order. Respondents shall not be required to compensate the property owners for such agreements nor to commence any proceedings to obtain such agreements. If Respondents are able to obtain such agreements, evidence of those agreements shall be provided to EPA within ten (10) days of their receipt by Respondents. If Respondents are unable to obtain access agreements after using their best efforts, Respondents shall notify EPA of their failure. EPA then will use its best efforts and all legal authority, to the extent necessary, to assist in obtaining access. Any delays resulting from an inability, despite "best efforts," to obtain such access agreements shall not be deemed a violation of this Consent Order, and any schedule shall be extended, to the extent of the access-related delay, for completion of the work set forth in this Consent Order.

ARTICLE XV. CONFIDENTIALITY CLAIMS

58. Respondents may assert a business confidentiality claim covering all or part of the information submitted pursuant to this Consent Order in accordance with § 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). The information covered by such a claim will be disclosed by EPA only to the extent and by the procedures specified in 40 C.F.R. Part 2, Subpart B and EPA agrees to provide notice of disclosure of confidential information to Respondents as required by these regulations. Such a claim may be made by placing on or attaching to the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend or other suitable form of notice employing language such as "trade secret," "proprietary," or "company confidential." Allegedly confidential portions of otherwise non-confidential documents should be clearly identified and may be submitted separately to facilitate identification and handling by EPA. If confidential treatment is sought only until a certain date or occurrence of a certain event, the notice should so state. If no claim accompanies the information when it is received by EPA, it may be made available to the public without further notice to Respondents.

ARTICLE XVI. RETENTION OF DOCUMENTS AND INFORMATION AVAILABILITY

59. Respondents and EPA agree to make available to each other, upon reasonable prior request, all sampling, tests, and other analytical data generated by either party pursuant to or in oversight of this Consent Order.

60. Respondents shall, without regard to any document retention policy to the contrary, preserve during the pendency of this Consent Order and for a minimum of six (6) years after its termination, all non-privileged records and documents in the possession, custody or control of Respondents, their divisions, parent corporations, employees, agents, accountants, contractors or attorneys which relate to work performed pursuant to this Consent Order. During this six-year period, upon request by EPA, Respondents shall provide to EPA the requested documents or copies of requested documents.

ARTICLE XVII. REIMBURSEMENT OF OVERSIGHT COSTS

61. Within forty-five (45) days of the end of the first quarter of each EPA fiscal year, EPA shall provide Respondents with an accurate and detailed accounting of all oversight costs attributable to the Baxter Springs and Treece Subsites respectively, which EPA claims to be recoverable under Section 107 of CERCLA, 42 U.S.C. § 107, and for which EPA seeks reimbursement from Respondents. Oversight costs shall include all reasonable costs of EPA's oversight of the RI/FS(s), including, but not limited to, pertinent time and travel costs of EPA personnel, contractor costs, compliance monitoring, including the collection and analysis of split samples, inspection of response activities, site visits, interpretation of Consent Order provisions, discussions regarding disputes that may arise as a result of this Consent Order, and review and approval or disapproval of reports.

62. Respondents shall, within forty-five (45) days of receipt of this accounting, remit a certified check for those uncontested oversight costs, made payable to the Hazardous Substance Superfund. Respondents' certified check should identify the name of the Baxter Springs and Treece Subsites, the location of the Baxter Springs and Treece Subsites, the EPA Docket Number for this Consent Order, and be forwarded to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

63. Copies of the transmittal letter and check shall be sent simultaneously to the RPM.

64. Respondents may contest payment of any oversight cost for which EPA seeks reimbursement if they determine that EPA has not provided an accurate and detailed accounting, has made an accounting error or has included a cost item that is not recoverable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Such an objection shall be made in writing within forty-five (45) days of receipt of the accounting and must be sent to Cherokee County Site Attorney, Officer of Regional Counsel, EPA Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101. Any such objection shall specifically identify the contested costs and provide a detailed explanation of the basis for objection. EPA shall respond to the objection in writing within thirty (30) days of receipt of the objection. Any unresolved objections shall then be subject to the dispute resolution process prescribed in Article XX. If EPA prevails in the dispute resolution process concerning all or any part of the contested

costs, Respondents shall remit to EPA, in the manner prescribed in Paragraph 62 of this Article, a certified or cashier's check for the amount of the contested costs (plus interest), if any, to which EPA has been determined to be entitled at the resolution of the dispute.

65. If the EPA prevails in a dispute over costs, the rate of interest on the outstanding unpaid balance shall be the same rate as is specified for interest on investments of the Hazardous Substances Superfund.

66. Consistent with Article V, in no case shall any Respondent be required to reimburse EPA for oversight costs attributable to a subsite for which that Respondent has been determined to have no involvement.

ARTICLE XVIII. RESERVATION OF RIGHTS

67. Nothing in this Order should be construed to limit the response authority of EPA under Section 104 of CERCLA, 42 U.S.C. § 9604; provided that, so long as Respondents are in compliance with this Consent Order, EPA agrees not to undertake RI/FS(s) or additional RI/FS work for the Baxter Springs and Treece Subsites, except in accordance with Article IX.

ARTICLE XIX. OTHER CLAIMS

68. In entering into this Consent Order, Respondents do not waive any right to seek reimbursement under section 106(b) of CERCLA, 42 U.S.C. § 9606(b) for any past, present or future costs incurred in complying with this Consent Order. This provision

shall not be construed as a waiver of any right of reimbursement that Respondents may have against any person.

69. Nothing in this Order shall constitute or be construed as a waiver of or release from any claim, cause of action or demand in law or equity of EPA or Respondents, individually or collectively, against any person, firm, partnership, subsidiary or corporation not a signatory to this Consent Order for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substance, pollutant, or contaminant, found at, taken to, or taken from the Subsites.

70. This Consent Order does not constitute a decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

71. EPA and Respondents agree that this Consent Order embodies a "settlement" as that term is used in Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and Respondents are hereby afforded contribution protection to the full extent contemplated by CERCLA and other applicable statutes and principles of law.

72. Respondents agree that with respect to any suit or claim for contribution brought against them for matters covered by this Consent Order, they will timely notify EPA of the institution of the suit or claim. EPA and Respondents also agree that EPA shall be under no obligation to assist Respondents in defending against any such suits for contribution.

ARTICLE XX. DISPUTE RESOLUTION

Subsection A: General

73. Pursuant to Section 121(e)(2) of CERCLA, the parties shall attempt to resolve expeditiously, informally and in good faith any disagreements arising under or from the implementation of this Order or any work required hereunder pursuant to Subsection C of this Article. (No inference shall be drawn from the fact that certain paragraphs in this Order specifically refer to Dispute Resolution while others do not, and such fact shall not be construed to exclude disputes arising under this Order from the application of this Article.) The provisions of this Article shall be the exclusive mechanism for resolving disputes arising under this Order.

74. Respondents' decision to invoke dispute resolution shall not constitute a Force Majeure event under Article XXII of this Order.

Subsection B: Notice

75. If Respondents raise a good faith disagreement or objection with respect to the interpretation or implementation of this Order, or if Respondents conclude that an impasse has been reached with regard to the requirements of this Order, Respondents shall orally notify EPA immediately of their objection. Respondents shall subsequently provide written notice to EPA within seven (7) calendar days of oral notification.

Subsection C: Dispute Resolution Mechanism

76. EPA and Respondents shall then have a period which will not exceed fourteen (14) additional calendar days from the receipt by either party of the written notification, to reach agreement, unless a longer period is agreed to by the parties. If possible, such disputes shall be resolved by informal telephone conferences. Any party may also request that the parties confer to resolve the dispute through an informal conference, to be held within this fourteen (14) calendar day period.

77. At the end of this fourteen (14) calendar day process, or within seven (7) calendar days after an informal conference is held, whichever is later, EPA shall provide Respondents with a written statement of its decision signed by the Regional Administrator, Region VII. Such decision shall be deemed to be "final agency action" subject to judicial review and any Respondent shall have the right to seek judicial review of any such final agency action immediately, if the Respondent or Respondents so desire, in the appropriate United States District Court.

ARTICLE XXI. STIPULATED PENALTIES

78. Except as otherwise provided in this Consent Order, if Respondents fail to complete a deliverable or meet a specified schedule by the specified due date, Respondents shall be liable for stipulated penalties, as set forth below. Penalties begin to accrue on the third day after a deliverable is due or a violation

occurs, and extend through the period during which the violation (or noncompliance or failure or refusal) continues. EPA will provide written notice by certified mail, return receipt requested, that stipulated penalties are accruing for violations that are not based on timeliness. Payment shall be due within thirty (30) days from the date of a demand letter by EPA.

> 79. Respondents may dispute whether penalties are due by invoking Article XX, Dispute Resolution. Stipulated penalties will accrue during dispute resolution until EPA's written statement of decision is issued pursuant to Paragraph 77. If Respondents prevail, payment of any accrued Stipulated Penalties shall not be required. If Respondents do not prevail, EPA may collect all penalties, or, in its sole unreviewable discretion, a portion of the penalties that accrued prior to and during the period of dispute.

80. Except in circumstances constituting a force majeure event under Article XXIV, for each day that some work product or task completion called for by this Consent Order is overdue, or for which Respondents fail to submit a report or document or otherwise fail to achieve the requirements of this Consent Order, Respondents shall pay the sums set forth below as stipulated penalties. Stipulated penalties shall accrue in the following amounts:

a. For failure to commence Work as prescribed in this Consent Order or the Work Plan: \$500 for each of the third through the seventh day of failure to commence work, and \$750 for each day thereafter;

b. For failure to submit a final RI, FS or EA at the time required pursuant to this Consent Order or the Work Plan: \$600 for the third through the seventh day of failure to submit a final RI, FS or EA, and \$850 for each day thereafter; and

c. For failure to submit the Quality Assurance Project Plan, the Sampling and Analysis Plan and the Health and Safety Plan required by this Consent Order or the Work Plan: \$250 for the third through the seventh day, and \$350 for each day thereafter.

81. Any stipulated penalties paid pursuant to this Consent Order shall be paid by certified or cashier's check made payable to the Hazardous Substance Superfund and shall be remitted to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

Checks should identify the name of the Baxter Springs and Treece Subsites, the location of the Baxter Springs and Treece Subsites, and the EPA Docket Number of this Consent Order. Copies of the check and transmittal letter shall be forwarded to the RPM.

82. If Respondents refuse to pay stipulated penalties, the United States: (1) may institute contempt proceedings in the United States District Court for relief; and (2) does not waive the right to pursue other sanctions, remedies or penalties.

ARTICLE XXII. FORCE MAJEURE

83. Respondents shall perform the requirements under this Consent Order within the time limits set forth or approved or established herein, unless the performance is prevented or

delayed solely by events which constitute a force majeure. For purposes of this Consent Order, a force majeure is defined as an event arising from causes beyond the reasonable control of Respondents, including its employees, agents, consultants, contractors and subcontractors, which delays or prevents performance of any obligations required by this Consent Order and which cannot be overcome with due diligence on the part of Respondents, such as, without limitation, acts of God, vandalism, fires, floods, civil disorder or unrest, or inability to gain access to the Baxter Springs and Treece Subsites as may be necessary to perform work. Such events do not include, among other items, unanticipated or increased costs of performance, changed economic or financial circumstances, changed labor relations, normal inclement weather, and failure of Respondents to make timely and complete application for any required approval or permit.

84. If circumstances occur which may delay or prevent completion of any phase of the work or timely achievement of any deadline or schedule under this Order, which is caused by a force majeure event, Respondents shall notify the RPM (or, if unavailable, the Superfund Branch Chief, Waste Management Division of EPA, Region VII), orally within forty-eight hours after Respondents first become aware of the circumstances.

85. Oral notification shall be followed by written notification, made within seven (7) business days of when Respondents first become aware of the circumstances in question. The written notification shall fully describe the force majeure

event, the reasons [^] the delay is beyond the reasonable control of
Respondents; the anticipated duration of the delay; actions taken
[^] or to be taken to prevent or minimize the delay; a schedule for
implementation of any measures to be taken to mitigate the effect
of the delay; and a statement as to whether, in the opinion of
Respondents, such event may cause or contribute to an
endangerment to public health, welfare or the environment.

[^] Respondents shall adopt all reasonable measures to avoid or
minimize any such delay.

[^] 86. If EPA and Respondents agree [^] that a delay is or was
caused by a force majeure event, such delay shall not be deemed
to be a violation of Respondents' obligations under this Consent
Order and shall not subject [^] Respondents to liability for
stipulated penalties set forth in Article XXI. [^] To the extent a
delay is attributable to a force majeure event, the schedule
affected by the delay shall be extended for a period equal to the
delay resulting from such circumstances and, if necessary, the
schedule for any succeeding phase of the work affected by the
delay shall also be extended. [^]

[^] 87. Failure of [^] Respondents to comply with the notice
requirements of Paragraphs [^] 84 and [^] 85 is a waiver of [^] Respondents'
right to invoke the benefits of Paragraph [^] 86.

[^] 88. If EPA and Respondents cannot agree that any delay in
compliance with the requirements of this Consent Order has been
or will be caused by a force majeure event, or on the duration of
any delay necessitated by a force majeure event, the dispute
shall be resolved according to the dispute resolution provisions

in Article XX herein. Respondents shall have the burden of demonstrating that the delay was caused by a force majeure event, that the amount of additional time requested is necessary to compensate for that event, and that Respondents took all reasonable measures to avoid or minimize delay.

ARTICLE XXIII. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

89. Respondents agree to indemnify and save and hold harmless the United States Government, its agencies, departments, agents and employees, from any and all claims or causes of action arising from or on account of acts or omissions of Respondents, their employees, agents, successors, assigns, or contractors, in carrying out the activities performed pursuant to this Consent Order; provided, however, that the Respondents shall in no way be obligated to indemnify and save and hold harmless the United States Government, its agencies, departments, agents and employees from any and all claims or causes of action arising from or on account of acts or omissions of the United States Government, its employees, agents, successors, assigns, or contractors in carrying out any activities relating to or performed at the Baxter Springs and Treece Subsites. The United States Government shall not be held out as a party to any contract entered into by Respondents, their employees or contractors in carrying out activities pursuant to this Order.

ARTICLE XXIV. EFFECTIVE DATE

90. This Consent Order is effective upon receipt of a fully executed copy of this Consent Order by Respondents and all times for performance of actions pursuant to this Consent Order shall be calculated from that date.

ARTICLE XXV. AMENDMENT

91. This Consent Order may be amended by mutual agreement of EPA and all Respondents. Such Amendments shall be in writing and fully executed. Amendments shall be effective upon receipt by Respondents of a fully executed copy.

92. No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, and any other writing submitted by Respondents will be construed as relieving Respondents of its obligation to obtain such formal approval as may be required by this Order.

93. Any deliverables, plans, technical memoranda, reports (other than progress reports), specifications, schedules and attachments required by this Consent Order which are to be approved by EPA, are incorporated into this Order subsequent to such EPA approval. ^

ARTICLE XXVI. TERMINATION AND SATISFACTION OF ORDER

94. The provisions of this Consent Order shall remain in full force and effect until completion of all work required by this Consent Order. Respondents shall notify EPA in writing at the time they believe all work has been completed. Within forty-

five (45) days of receipt of this notice, EPA will advise Respondents in writing of its determination that all work required by this Consent Order are complete or if any further actions are necessary to complete the required work. The provisions of this Consent Order shall terminate upon Respondents' receipt of written notice from EPA that all the requirements of this Consent Order have been successfully completed. Respondents' obligations pursuant to Article XVI, Records Retention; Article XVII, Reimbursement of Oversight Costs; Article XVIII, Reservation of Rights; and Article XIX, Other Claims, shall not terminate with such notice.

ARTICLE XXVII. COUNTERPARTS

This Consent Order may be executed and delivered in counterparts, each of which when executed and delivered shall be deemed an original, but such counterparts shall together constitute one and the same document.

IN WITNESS WHEREOF, the parties have affixed their signatures below:

For the
United States Environmental
Protection Agency
Region VII

Date

E. Jane Kloeckner
Assistant Regional Counsel

For

Date

DRAFT NOVEMBER 9, 1989

For

Date

For

Date

IT IS SO ORDERED

Date

David A. Wagoner
Director, Waste Management
Division
U.S. Environmental Protection
Agency, Region VII

DRAFT NOVEMBER 9, 1989

ATTACHMENT A

WORK PLAN FOR RI/FS, AND ENDANGERMENT ASSESSMENT
